

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

75-7430

United States Court of Appeals
FOR THE SECOND CIRCUIT

RICHARD HUGHES,

Plaintiff-Appellant,

—against—

GENERAL MOTORS CORPORATION,

Defendant-Appellee.

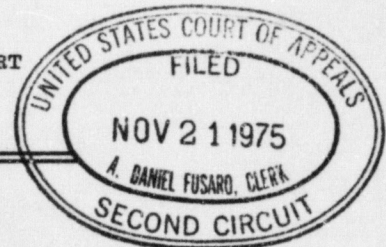
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT

ARNOLD B. ELKIND
Attorney for Plaintiff-Appellant
122 East 42nd Street
New York, N.Y. 10017
986-4921

ARNOLD B. ELKIND
BENNETT J. WASSERMAN

of Counsel



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BRIEF FOR PLAINTIFF-APPELLANT

ISSUES PRESENTED FOR REVIEW

- I. Whether the court improperly restricted plaintiff's pre-trial discovery by its Order of June 18, 1974, denying plaintiff's application to examine Edward N. Cole, who was then President of General Motors and who had assigned prior to the manufacture of the truck involved in this litigation, Patent No. 2,779,498 dated January 29, 1957, to the defendant, which related to an improved fuel tank filler system of which Mr. Cole was the inventor?
- II. Whether the trial court erred in refusing to permit the plaintiff to introduce into evidence Patent No. 2,779,498 which contained a statement from which the jury could find that General Motors was aware of the risk of leakage from the filler neck assembly incorporated in the truck in this lawsuit?
- III. Whether the trial court erred in refusing to permit the plaintiff to elicit testimony that the design defect that allegedly was responsible for the presence of a combustible level of gasoline vapors in the cab of the truck, was eliminated by the defendant in subsequent model

years?

- IV. Whether the trial court erred in its refusal to permit the introduction into evidence of colored photographs showing the burned areas of the plaintiff's body, which would have tended to support an inference that the filler tube assembly of the truck was implicated in the leakage of gasoline vapors into the cab?
- V. Whether the trial court improperly refused to permit plaintiff's expert to testify in rebuttal to the defendant's expert's opinion as to the source of gasoline vapors and fire in the passenger compartment?
- VI. Whether the trial court's charge to the jury, that the design of two of defendant's competitors, which positioned their gas tanks in the same manner as that of the defendant, was erroneous because of the absence of any evidence pertaining to the fuel tank and filler tube assemblies of those two competitors?
- VII. Whether the plaintiff's case was unfairly prejudiced by the trial court's refusal to instruct the jury that the design of the defendant's fuel tank and filler neck assembly could still be found to be defective even though it may have

conformed to prevailing industry standards?

STATEMENT OF PROCEEDINGS

This action was based on diversity of citizenship jurisdiction (28 U.S.C. §1332) and sought to recover damages for the devastating burn injuries which plaintiff sustained in a flash fire while a passenger in a truck designed, manufactured and sold by the defendant. The plaintiff claimed that his injuries were caused by the defendant's negligence in designing a truck with a fuel tank and filler neck assembly that encouraged the accumulation of a combustible level of gasoline vapors within the passenger cab. Plaintiff also claimed that this design was defective and that the defendant is strictly liable in tort for the injuries sustained. The case was tried before Judge Robert L. Carter and a jury on May 19, 20, 21, 22, 23, 27 and 28, 1975 in the Southern District of New York. The Court submitted special questions to the jury, and in answering those questions the jury returned a verdict in favor of the defendant on both of plaintiff's claims. The appeal is from the judgment entered on July 15, 1975 dismissing the complaint (585A).*

* numbers in parentheses followed by the letter "A" refer to pages in Joint Appendix.

STATEMENT OF FACTS

Richard Hughes was employed by the Township of Weehawken, New Jersey as a heavy laborer. In that capacity he and two co-workers, Charles Brennan and Henry Ollert were assigned to a 1966 GMC truck (Serial Number V4005 F 42814 E) designated "Truck No. 2" by the Weehawken Public Works Department. The plaintiff's job entailed the collection of heavy refuse and debris along the "uptown route".

The defendant manufactured the cab and chassis of "Truck No. 2" in July of 1966 and transferred it to its dealer, McGuinness GMC Trucks, Inc., in Jersey City. The dealer then arranged to have the dump body installed on the chassis and thereafter, in October of 1966, sold the truck to the Township.

As expected for trucks of this type, it received heavy use during the five years that it was in service. In a deposition the plaintiff even described it as a "piece of junk". Repairs were normally performed at local shops, one of which was Highpoint Garage in Union City, New Jersey.

On Saturday, August 14, 1971, the plaintiff and the other crew members of "Truck No. 2" reported for their regular half-day of work at 8:00 A.M. (Tr.194)*.

* Tr. references are to trial transcript pages not reproduced in the Joint Appendix.

The weather was hot and humid; the plaintiff wore a light short sleeved pullover shirt and white pants. Brennan, the driver, encountered no difficulty starting the truck that morning (Tr.68). Although it was customary for him to get gas at the Township garage before leaving on the assigned route, Brennan neglected to do so that day. After being out for about two hours, the crew had "picked up so much stuff" (Tr. 68) that they had to go to the Secaucus dump to unload before they could complete the pickups along their route. On their way to the city dump Brennan noticed that he "was running low on gas" (Tr. 68). He may have suspected a gas leak (Defendant's Exhibit "A", 570 A). He pulled the truck into an Esso gas station on Tonnelles Avenue in Jersey City and asked for two or three dollars worth of gas. After paying the attendant, he turned the key to start the engine whereupon the interior of the cab spontaneously filled with flames (146 A). All three crew members sustained burns in varying degrees of severity (Plaintiff's exhibits 24 & 25, 553A, 554A). The plaintiff was located in the center of the bench seat in between the driver and passenger positions. The situs of plaintiff's burns was concentrated on the left side of his body, notably the left arm and left

portion of his back, as well as on his face (165A-175A, 472A). He has undergone numerous plastic and reconstructive surgical procedures and has thus far been unable to return to work.

In addition to the plaintiff and his two co-workers, Lieutenant William H. Neebe of the Jersey City Police Department offered eyewitness testimony at trial. Neebe was on supervisory patrol driving south on Tonnelles Avenue. He was about 25 to 30 feet when he saw the truck's cab in flames. Lieutenant Neebe testified: "What attracted my attention to it was smoke and flame coming from the cab and men jumping from the cab." Describing the fire with greater particularity, Neebe testified that he observed "primarily black, thick smoke coming from the vicinity of the cab and partially from under the hood, flames at the base of the smoke from the cab." He immediately stopped his patrol car, "radioed the fire alarm, got out and also called for other police assistance...and...an ambulance" (139A-143A, Tr. 118).

Patrolman Matthew Diana arrived at the scene of the fire "a few minutes after 10:00 [A.M.]", in response to Neebe's radio call. By the time he got there, "it looked like the whole front end was burning" (Tr.150).

Battalion Chief Raymond Price of the Jersey City Fire Department arrived at about 10:15 or 10:30 A.M. By then, one fire pumper and one truck had extinguished the flames. His duty was to determine the cause of the fire. Price testified: "It was my opinion that the fire started from vapors in the cab of the truck" (Tr. 124). In his report (Plaintiff's Exhibit 24, 552A) he listed the cause in National Fire Code Symbols "01-80" and explained that "01 means electrical and 80 means petroleum" (Tr. 47). Although Price could not determine the source of the fumes or the source of ignition (Tr. 136), he adhered to the view on cross-examination that the fire originated in the cab and offered the following rationale: "... I figured that if the fire had started in the engine, the men would have been able to get out because of the firewall between the engine and the cab" (Tr. 138).

Weehawken's Fire Chief, Robert Cahill, ordered his deputy, Richard F. Lennon, to inspect the truck involved in the fire. On the Monday following the fire Lennon performed a " cursory examination " of the vehicle, which had been removed to a lot adjacent to the Weehawken Public Works Garage (Tr. 155). Lennon testified that the possible fuel source that burned was

gasoline vapors and that possibly these vapors were located in or adjacent to the cab (Tr. 158). Lennon reported the results of his inspection to Chief Cahill and these findings were embodied in Cahill's report to the Commissioner of Public Works dated August 16, 1971, (Defendant's Exhibit C, 572A).

For a period of about six months the burned-out vehicle (Truck No. 2) remained at the Township's garage. (Plaintiff's Exhibits 1,2,3,5, 544A-547A). It was sold as junk on March 28, 1972 (Tr. 554), prior to the commencement of this litigation. Neither party had the opportunity to inspect the vehicle, but their counsel did have available to them several photographs of Truck No. 2, taken after the fire.

In addition, counsel had access to a 1966 GMC truck with a serial number very close to that of Truck No. 2. This vehicle, frequently referred to as the "sister-truck" was also owned by the Township, which designated it Truck No. 1. (Serial No. V4005 F 42808 E). Both trucks were of the V4000 Series. General Motors admits that insofar as their fuel and ignition systems are concerned, both these trucks are of the same design (103A, 104A, 193A-194A). Accordingly, plaintiff introduced the flexible filler neck assembly of Truck No.

1 and it was received in evidence as Plaintiff's Exhibit 42. Both parties introduced as evidence photographs of Truck No. 1.

Plaintiff's theory of liability was that the design of the vehicle calling for the placement of the fuel tank within the cab, immediately behind the seat, to which was connected a filler tube joined together by clamps which were inaccessible for visual inspection and tightening, which originated from the spout of the gasoline tank and exited outside the cab just a few inches from the driver's window, and acted as a conduit through which gasoline was pumped, all encouraged the accumulation of a combustible level of gasoline vapors within the cab during the refueling operation. Plaintiff sought to prove that incorporation of these design elements constituted negligence on the part of General Motors and further, that this design was defective.

The defense of the action was based on an opinion that the source of the gasoline vapors that burned was in the engine compartment in the area of the carburetor (337A). By this opinion, an igniting spark came from the distributor and the resulting fire was propelled upwards into the cab through slots in the floor which accommodated two fork levers. The presence of this

mechanism was for the control of the dump apparatus installed on the truck's chassis after it had arrived at the defendant's dealership but prior to its delivery to the Town of Weehawken. The defendant denied the presence of a combustible level of fuel vapors within the cab independent from that in the engine compartment, that the location of the fuel tank had any significance in the explanation of the fire (375A), and that the alleged state of the truck's disrepair explained the fire under the hood.

ARGUMENT

Given the state of the evidence before the jury there is no question but that a verdict for the defendant was the only logical one that they could have rendered. The trial court's exclusion of certain pieces of evidence and its thwarting of certain salient lines of questioning by plaintiff's counsel deprived the jury of some highly probative evidence from which they could have drawn inferences as to whether the defendant was negligent in designing a truck with, among other things, its fuel tank and appendages within the passenger cab, and whether these design features rendered the design of this truck defective. In addition, the plaintiff was

seriously hampered by the court's refusal to allow plaintiff to examine Edward Cole pertaining to a patented fuel system which would have provided a purportedly safer fuel conduit and tank system than that incorporated in the 1966 truck in which plaintiff was severely burned. Mr. Cole was the inventor of that safer fuel system; he was awarded a patent for it which he assigned to the defendant in 1957. By sheer coincidence, Mr. Cole was the President of General Motors when plaintiff sought to depose him. The impact of the meager evidence that plaintiff managed to elicit was further softened by the trial court's refusal to permit expert testimony in rebuttal and by certain parts of the trial court's charge.

The cumulative effect was that the jury's fact finding responsibilities were impeded to such an extent that after seven days of testimony the jury rendered a verdict for defendant after less than one hour of deliberation. These elements in concert operated to deprive the plaintiff of a fair trial by jury.

POINT I

THE TRIAL COURT'S DENIAL OF PLAINTIFF'S
APPLICATION TO EXAMINE EDWARD COLE BEFORE
TRIAL WAS A PREJUDICIAL ABUSE OF DISCRETION

Plaintiff-appellant had the opportunity to depose two of defendant's employees -- Messrs. Dooley and Hubbard. Dooley was voluntarily produced in response to plaintiff's Notice to take Deposition (16A). It was, however, obvious from Mr. Dooley's testimony that he was not familiar with the fuel and ignition systems and the gasoline tank assembly of defendant's truck as required by plaintiff's Notice. Accordingly, the trial court directed the defendant to produce a witness with familiarity of these components (31A).

On March 1, 1974 the plaintiff served upon defendant a Request for Production of Documents seeking information on the benefit-to-cost rationale regarding utilization of the Cole patent (46A). Under response dated September 20, 1974, the defendant claimed it was unable to locate any such information (95A).

On March 11, 1974, the court-ordered deposition of the defendant took place. Mr. Hubbard, who was produced on behalf of General Motors, was a liaison engineer, but his qualifications did not fulfill the requirements of plaintiff's Notice and the trial court's

order of January 31, 1974. It was, however, at the Hubbard deposition that engineering sketches were first made available to plaintiff showing the design of the filler neck assembly which plaintiff alleged as one of the possible sources of vapor leakage within the cab. These sketches, coupled with the Cole patent's specifications of the leakage potential in flexible filler tube assemblies, led plaintiff's counsel to question Mr. Hubbard on the quality control procedures employed by defendant to insure the integrity of the clamp seals. Mr. Hubbard was unable to shed light on these matters nor was he able to identify anyone in defendant's organization other than Mr. Cole who was knowledgeable on the quality control aspects of fuel tank and filler neck assembly operations (81A-86A).

In his moving papers seeking the court to direct the deposition of defendant by Mr. Cole, plaintiff's counsel stressed the singularly excellent position Mr. Cole enjoyed regarding the possession of highly probative factual information relative to the triable issues in this litigation (87A-88A). It was a sheer coincidence that at the time this lawsuit was in its discovery phase Mr. Cole was the President of General Motors. This fact apparently assumed an enormously

persuasive role in the trial court's denial of plaintiff's application to examine Mr. Cole. According to the trial court, plaintiff's "request borders on harassment and would at best result in duplication of testimony." (92A).

In *Colonial Capitol Co. v. General Motors Corp.* 29 F.R.D. 514 (D.Conn. 1961), the same defendant as in the instant case sought to vacate Notices of deposition served on several corporate officers and employees. Prior to serving these Notices plaintiff had already deposed twelve other officers and employees of General Motors. One of the Notices of deposition which the defendant sought to vacate was directed to Fredric C. Donner, the Chairman of the Board and Chief Executive Officer of General Motors. The court, instead of denying the deposition, first required Mr. Donner to submit to deposition on "written interrogatories without prejudice to the subsequent taking of [a] deposition on oral examination if the answers to the interrogatories with regard to his participation in or knowledge of the matters forming the subject matter of this suit appear... to warrant it." 29 F.R.D. at 518. Pivotal factors in the court's determination was Mr. Donner's request that he not be taken away from his responsibilities at the defendant's offices and that Mr. Donner had no know-

ledge pertaining to the facts in that lawsuit. This stands in sharp contrast to the case at bar where Mr. Cole, as inventor of an improved mode of filler neck-fuel tank assembly, surely did have relevant information pertaining to the triable issues. In comparison to the number of depositions taken in *Colonial* (twelve) it should be obvious that the plaintiff-appellant herein did not attempt to abuse discovery procedures or to harass the defendant.

When the exercise of the court's discretion in *Colonial* is measured against that in this litigation one can hardly come to any conclusion but that the trial court abused its discretion in refusing plaintiff to examine Mr. Cole. See also *Buryan v. Max Factor & Co.*, 41 F.R.D. 330 (S.D.N.Y. 1967) where the court allowed the examination of five top corporate officers but required the examining party to conduct the examination at the corporation's place of business in California. In light of the numerous alternatives provided to the trial court by Rule 26(c) of the Federal Rules of Civil Procedure to fashion more appropriate controls over discovery procedures, the exercise of the court's discretion so as to thwart discovery was a prejudicial abuse of discretion on a matter of central relevance.

POINT II

THE TRIAL COURT'S RULINGS ON THE ADMISSIBILITY OF
EVIDENCE TENDING TO SHOW THE DEFENDANT'S NEGLIGENT
CONDUCT AND THE DEFECTIVENESS OF ITS PRODUCT'S
DESIGN WERE GROSSLY PREJUDICIAL TO THE
PLAINTIFF'S CAUSE

A. THE TRIAL COURT'S FAILURE TO ADMIT THE
COLE PATENT AS EVIDENCE OF DESIGN NEGLIGENCE
AND DEFECT WAS PREJUDICIAL ERROR

The plaintiff-appellant offered, but the Court would not receive, Patent No. 2,779, 498, issued by the United States Patent Office on January 29, 1957, (Plaintiff's Exhibit 51 for Identification, 560A). On its face, the patent reveals that it was awarded to Edward Cole and Edward Naudzius and was assigned by them to General Motors, prior to the date of issue. At that time Mr. Cole was employed in an engineering-management capacity by the defendant (414A). The plaintiff offered the Cole patent for three purposes, in as many times:

- (a) as circumstantial evidence of the defectiveness of the design in the 1966 GMC truck (204A);
- (b) to corroborate the testimony of Professor Weinstein that the design used was defective (216A); and
- (c) to show that the defendant knew or should have known that the design of the 1966 truck's fuel

tank and filler neck arrangement had a propensity towards leakages (411A-422A).

Empirically, the flash fire in which Mr. Hughes was injured occurred at a point in time when the probability of the presence of a combustible level of gasoline vapors within the cab was at its peak, since the tank had just taken on about 6 gallons of gasoline (429A). As part of his explanation of the probable source of gasoline vapors within the cab, Professor Weinstein alluded to the location of the filler neck and the possibility of its connections coming loose (215A). A fuel system which included these design attributes was, in his opinion, unreasonably dangerous (219A-22A).

The "Cole patent" related "to fuel or gasoline tanks employed in vehicles and to which tube members are attached as fittings to facilitate filling of the tanks." (560A, Lines 11-13). The fuel tank of the sister-truck was Plaintiff's Exhibit 45. The tube member fitting was Plaintiff's Exhibit 42, and it was called the "filler tube" or "filler neck" at trial. It is composed of rubber and plastic which are connected with two screw-type clamps at the joints necessarily formed (200A-201A). The filler tube is located between the spout of the gas tank and the exterior wall of the truck exiting a few inches to the rear of the driver's window

and is concealed between the inner and exterior cab walls (Plaintiff's Exhibits 14,16,17,19, 406A-407A, 548A-551A). It serves as a flexible conduit through which gasoline is poured into the tank (196A-200A). Accessibility for clamp tightening is very awkward (409A) and the manufacturer did not consider this an item requiring regular maintenance (394A, 397A, 400A-403A).

In its discussion of the state of the art relative to the invention, the Cole patent states (560A, Lines 14-31):

"When fuel tanks are made with filler tubes integral therewith, the devices constitute cumbersome pieces which are difficult to ship and to store. The tubes are generally of considerable length which factor must be considered in providing sufficient space for the shipment or storage. Handling of the devices is not only difficult because of the tubular protuberances but it must be with care as any undue strain in the junctions between the tubes and the corresponding tanks may cause damage and leakages. In place of making the filler tube and tank as an integral unit, it has sometimes been the practice to make those parts separately and ultimately to connect them in a vehicle by means of a flexible conduit and suitable clamps. This latter expedient is not entirely satisfactory as leakages may occur at either or both of the two joints necessarily formed and the installation in a given vehicle cannot be carried out as expeditiously or as quickly as would be desired."

In order to overcome these design shortcomings the patent offered these alternatives:

"[a] a fuel tank in combination with a tubular filling spout member which is attachable or detachable from the tank in a construction which provides an improved seal joint" (560A Lines 32-35); and

"[b] a fuel tank with a tubular filling spout member having a sealed universal connection leading to the tank" (560A Lines 36-38).

The V4000 series GMC truck, one of which was the vehicle in this litigation, was sold between 1960 and 1966 (23A). The state of the art at that time should have suggested to the defendant a safer alternative design as embodied in the Cole patent, but the defendant did not incorporate that alternative in the V4000 series (70A - 71A). In the pre-trial discovery phases the defendant called the Cole patent "obscure and expired" thus ascribing to it marginal significance (60A). The Cole patent was however a significant method of ascertaining the state of the art in the late 1950's which even the defendant's counsel conceded was a relevant area of inquiry (375A). *L-O-F Glass Fibers Co. v. Watson*, 228 F.2d 40, (D.C.Cir 1956). It was also "evidence which would permit an inference that a dangerous condition existed prior to sale". *Jakubowski v.*

Minnesota Mining & Mfg. 42 N.J. 177, 183-184, 199 A.2d 826 829 (1964); *Scanlon v. General Motors Corporation*, 65 N.J. 582, 326 A2d 673 (1974).

Surely, in order for the jury to undertake a meaningful inquiry as to whether the design of the truck was defective it would have been important for them to know what other design options existed prior to the date defendant manufactured its truck. See *Garst v. General Motors Corp.* 207 Kan.2, 484 P.2d 47, 61 (1971). With such data, a rational weighing of the defendant's design choices could have been made.

Further, the plaintiff was entitled to have the testimony of its expert witness corroborated by evidence of design alternatives. In *Bair v. American Motors Corp.* 473 F.2 740 (3d Cir. 1973) the plaintiff brought suit for injuries sustained when she was ejected from her car. Plaintiff stated causes of action in negligence and strict liability and advanced the theory that the door latch of her car was negligently and defectively designed. Plaintiff's expert testified that "American Motors' failure to adopt [a safer] design by 1966 was negligent, and that the absence of... a[n] [available] latch mechanism made its product inherently defective". *Id.* at 741.

To corroborate her expert's testimony plaintiff offered the results of three studies conducted by the Cornell Aeronautical Laboratory, Inc., an academic research organization supported by governmental grants. The studies supported the opinion of plaintiff's expert witness that an alternative type of door bolt assembly "was significantly more likely to prevent ejection" Id. at 742. The trial court rejected the offer on hearsay grounds, and the Court of Appeals reversed, holding that evidence which corroborates the opinion of an expert witness, if improperly excluded, is prejudicial error. "Had [plaintiff's expert] been permitted to support his opinion by reference to these studies, his contention that American Motors had neglected to incorporate in its 1966 door latch design the current state of the art in safe design would undoubtedly have been reenforced". Id.

This very court has long recognized that an expert's opinion could be corroborated by his reading excerpts from reports prepared by agencies of the United States government. *Western Assurance Co. v. J.H. Mohlman Co.* 83 F. 811, 821 (2d Cir.) cert. denied, 168 U.S. 710, 18 S.Ct. 949, 42 L.Ed. 1213 (1897). See also *Vicksburg & Meridian R.R. Co. v. Putnam*, 118 U.S. 545,

7 S.Ct. 1, 30 L.Ed. 257 (1886).

While the trial court did not specifically indicate the basis of its excluding the Cole patent, the impression one gets from the trial transcript is that there may have been a question of the reliability of the language Mr. Cole and his co-inventor used¹ (412A-418A). If lack of reliability is the rationale behind the hearsay rule then the trial court erred in excluding the Cole patent. "That courts must, on hearsay grounds, be deprived of the use of the collected data on which other departments of government, industry, and the engineering profession obviously rely,² makes no more sense now than in 1897, when that notion was rejected by the Second Circuit." *Bair v. American Motors Corp.*, *supra* at 744. See also, *Weaver v. Ford Motor Company*, 382 F.Supp. 1068 1073-4 (E.D.Pa 1974).

The defendant's expert witness, Ronald Elwell, was employed by the defendant in its engineering analysis department (Tr. 606). On cross examination he was

1. Whatever doubts the trial court had as to the language used in the Cole patent could have been resolved at the discovery stage had the court permitted plaintiff to examine Mr. Cole. See Point I supra and 51A-91A.

2. Professor Weinstein testified that he had relied inter alia on the Cole patent in forming his opinion (180A).

asked whether the defendant was aware in 1966 that the filler necks (Plaintiff's Exhibit 42) were becoming loose and developing leakages. His response was negative (410A). Plaintiff's counsel then showed Elwell the Cole patent to refresh his recollection, at which point the trial judge asked the jury to leave the courtroom (410A-412A). Elwell, while conceding that he was familiar with the patent (413A), responded that it did not refresh his recollection as to whether he was aware that General Motors knew of the leakages (412A). He was not able to give a definitive explanation for Mr. Cole's statement in the patent pertaining to leakage in the joints formed between the filler neck parts and the fuel tank (415A). He was however, able to identify Mr. Cole's position in the General Motors hierarchy at the time Cole obtained the patent (414A). The plaintiff's third offer of the Cole patent -- this time on the issue of whether General Motors knew or should have known about the leakage problem -- was rejected by the Court (416A-421A).

The trial court would have required the plaintiff-appellant to make burdensome preliminary showings before it would admit the Cole patent (416A-421A). Apparently, the Court was most troubled about the veracity of the statements made in the patent pertaining to leakage

problems in filler necks and, the superiority of Mr. Cole's design. Assuming that such a showing were required for the patent's admissibility on the question of whether defendant knew or should have known about the danger of leakages, then the trial court put plaintiff in the classic Catch-22 predicament by its refusal to direct Mr. Cole to submit to an examination before trial (49A-93A). While plaintiff-appellant contends that his being put in a position whereby he was not permitted to ascertain facts to satisfy the court's preliminary requirements is in itself prejudicial error, the patent was still admissible without the showing the court required.

As a document issued by the Federal government, the Cole patent was entitled to be admitted into evidence. There could be no question as to its authenticity in light of defendant's admission in that regard (99A, 104A). See also 28 U.S.C. §1733(b); Federal Rules of Evidence Rule 902 (10) and 35 U.S.C. §282.

The trial court expressed the fear that the language in the Cole patent referring to the propensity toward leakages may have been "puffing" to emphasize the superiority of the improved invention. The court would have wanted evidence of "how the Patent Office operates"

before the patent would have been received (417A). Such a basis has never been required of documents of governmental agencies. Plaintiff-appellant requests this Court to take judicial notice of the Manual of Patent Examining Procedure issued by the U.S. Dept. of Commerce, Patent Office, §608.01 (r) of which provides:

"The applicant may refer to the general state of the art and the advance thereover made by his invention, but he is not permitted to make derogatory remarks concerning the inventions of others."

A patent examiner would view this provision as a mandate to purge the "puffing" of an inventor from his patent application. In addition, 35 U.S.C. §115 requires the application for a patent to be made under oath. Inferentially that oath would encompass the requirement that matters asserted in the application be truthful.

"The maker of an article for sale or use by others must use reasonable care and skill in designing it... so that it is reasonably safe for the purposes for which it is intended and for other uses which are foreseeably probable. And a person who undertakes such manufacturing will be held to the skill of an expert in that business and an expert's knowledge of the arts, materials and processes. Thus, he must keep reasonably abreast

of scientific knowledge, [literature] and discoveries touching his product and of techniques and devices used by practical men in his trade." 2 Harper & James, Law of Torts §28.4; *Martin v. Bengue, Inc.* 25 N.J. 359, 136 A.2d 626; 2 R. Hursh & H. Bailey, American Law of Products Liability 2d §9.3; Restatement 2d of Torts §398; Keeton, Products Liability -- Problems Pertaining to Proof of Negligence, 19 SW.L.J. 26, 30 (1965).

There is no dearth of case law holding that governmental documents of various sorts are admissible to show the manufacturer's negligence in connection with the design and sale of his products, as well as other triable facts. *Wright v. Carter Products*, 244 F.2d 53 (2d Cir. 1957); *Davis v. Wyeth Laboratories*, 399 F.2d 121 (9th Cir. 1968); *Carter Carburetor Corp. v. Riley*, 186 F.2d 148 (8th Cir. 1951); *Stasiukevich v. Nicolls* 168 F.2d 474 (1st Cir. 1948).

In *Wright v. Carter Products*, *supra*, this court held that the findings of a governmental agency were admissible in a product liability suit on the issue of whether defendant had notice that its product could be hazardous to some of its users. The court stated:

"Other evidence tended to establish the defendant's actual knowledge of the threat of injury

to some consumers. The defendant had received 373 complaints in the four years from 1948 to 1951. It had also been the object of an FTC order affirmed by the reviewing court of appeals prior to Mrs. Wright's purchase in 1951. Once the plaintiff had introduced competent evidence tending to prove that Mrs. Wright and other people are allergic to aluminum sulfate, the trial court should then have admitted the FTC findings, as affirmed, solely on the issue of the defendant's knowledge of the possible harmful propensities of its product." 244 F.2d at 59.

Literature from non-governmental sources is also admissible on issues of notice and knowledge. In *Webb v. Fuller Brush Company*, 378 F.2d 500 (3d Circuit, 1967) the court stated:

"Finally, the appellant sought to show that certain articles had been published concerning the dangers inherent in facial creams containing hormones and recommending the labelling of such preparations with warnings. This offer was made to support the appellant's claim that the appellee should have known that its product might be dangerous to users. The trial judge rejected the offer as hearsay. This was error. The publication of such articles was presented not to establish that the assertions therein were true, but rather that they should have alerted the appellee to possible hazards. In the light of the court's proper charge that appellee had a duty to warn if it knew or should have known that such a product might be injurious, the exclusion of the evidence was

prejudicial to the appellants
on an important issue." 378 F.2d
at 502.

In *Braun v. Roux Distributing*, 312 S.W. 2d 758 (Mo. 1958) plaintiff offered a listing of twenty three articles which appeared in the medical literature. The subject matter of the literature indicated that a chemical ingredient in defendant's hair dye could be hazardous. The court held that this evidence was admissible for the "purpose of establishing that the information was available and, therefore, that the defendant knew or should have known that the [ingredient] was dangerous." *Id.* at 763. See also, *O'Donnell v. Asplundh Tree Expert Co.* 13 N.J. 319, 99 A.2d 577; *La Plant v. E.I. DuPont De Nemours & Co.*, 346 S.W.2d 231 (Mo. App. 1961); *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292 (3rd Cir. 1961); *Cleary v. John M. Maris Co.* 173 Misc, 954, 19 N.Y.S. 2d 38 (1940); *G. Bernd Co. v. Rahn*, 96 S.E.2d 185 (Ga. 1956); *Sylvania Electric Products, Inc. v. Barker*, 228 F.2d 842 (1st Cir. 1955).

In addition to having the imprimatur of the United States Patent office, the Cole patent served the same function as did journal articles in the *Webb* and *Braun* cases. Since a manufacturer is required to keep itself current as to improvements in its field of endeavor, and since scientific and technical

literature with lesser indicia of reliability are admissible to show that the defendant knew or should have known about its product's dangers, then the Cole patent surely should have been admitted. In *Application of Nelson*, 280 F.2d 172 (1960) the United States Court of Customs and Patent Appeals stated that one of the public advantages of the patent specification "is the addition it makes to technical literature immediately upon issuance of the patent, without waiting for its expiration...The descriptions in patents are not addressed to the public generally, to lawyers or to judges but...to those skilled in the art to which the invention pertains or with which it is most nearly connected." *Id.* at 181.

The Cole patent was admissible as circumstantial evidence of defective design, to corroborate the opinion testimony of plaintiff's expert witness, and to show that defendant knew or should have known that the filler tube arrangement in their 1966 V4005 truck had a propensity toward leakages. The trial court's exclusion of this highly probative evidence was prejudicial to plaintiff's cause.

B. THE EXCLUSION OF EVIDENCE OF SUBSEQUENT
DESIGN MODIFICATION AND OF SAFER DESIGN
ALTERNATIVES WAS ERROR ON THE TRIAL
COURT'S PART

In order to prove that the design of the truck was defective the plaintiff sought to establish two facts:

(a) that the defendant modified the design after the accident in such a way as to eliminate the alleged hazards, and (b) that the state of the art at the time the defendant designed the truck would have permitted the defendant to position the fuel tank and its appendages in an alternative, safer position.

Plaintiff's counsel asked the Court's permission to read to the jury the following of plaintiff's Request to Admit and defendant's responses (99A-105A, 221A):

- Request 2: "That the defendant discontinued the design and manufacture of motor vehicles and trucks with gasoline tanks within the same compartment as that occupied by the driver and passengers."
- Response 2: "Admitted, at least as to domestic production."
- Request 3: "That the defendant has discontinued the manufacture of filler tube assemblies containing the arrangements employed in the 1966 GMC dump trucks of the V4005 series."
- Response 3: "Admitted, providing the question assumes the identical parts contained in the 1966 filler tube assembly."

The Court forbade these formal admissions to be read (222A) since there had not been "any connection between the discontinuance of the design and the fire." In an earlier side bar conference the Court was of the view that plaintiff first had to introduce evidence "to show that the changes in the design was [sic] due to the recognition of the fact that there was fault." Plaintiff argued the conceptual distinctions between negligence (culpable conduct) and strict liability (defective product), and welcomed a cautionary instruction limiting the jury's consideration of subsequent design modifications to plaintiff's strict liability cause of action alone (375A-380A). The Court, however, ruled against allowing testimony of subsequent modification (475A-476A) and earlier excluded evidence of design alternatives (221A).³

The Court below and all counsel agree that the

3. The reasoning behind the Trial Court ruling is not entirely clear. At one point the Court excluded evidence of subsequent design modification because there had not been "any connection between the discontinuance of the design and the fire." (222A). That link, of course, could have been inferentially drawn by the jury had they had the proffered evidence. Later, the Trial Court stated that those cases which plaintiff cited in support of admitting the evidence of subsequent design changes (Memorandum of Law, Record on Appeal, Item 70) dealt only with obvious dangers and were thus not applicable to the case at bar (475A-476A). This is entirely untrue. Both Sutkowski and Ault, discussed infra, deal with latent design defects.

substantive law of New Jersey is applicable to both of plaintiff's claims.

It is also agreed that evidence of subsequent remedial measures is inadmissible to show defendant's negligent conduct (376A). *Hansson v. Catalytic Construction Co.*, 43 N.J. Super 23, 127 A.2d 431 (App. Div. 1956). The rationale for this exclusionary rule has been (a) that subsequent remedial measures are irrelevant and (b) the public policy that receipt of such evidence would discourage defendants from taking safety measures to prevent future injuries. See e.g. *Columbia and P.S.R.Co. v. Hawthorne*, 144 U.S. 202 (1892); *Terre Haute & I.R. Co. v. Clem*, 123 Ind. 15, 23 N.E. 965 (1890); *Morse v. Minneapolis & St. Louis R. Co.*, 30 Minn. 465, 16 N.W. 358 (1883). But as with any other rule barring the receipt of evidence, a prodigious list of exceptions has developed over the years.⁴ While this has inevitably lead to more

4. In the product liability area, the major exception to the exclusionary rule has been on the issue of whether the post-injury safety measure was feasible prior to the accident. The exception is operative, however, where plaintiff seeks to rebut defendant's denial of feasibility, and thus to show negligent conduct. *Hansson v. Catalytic Construction Co.*, 43 N.J. Super. 23, 127 A.2d 431 (App. Div. 1956); *Brown v. Quick Mix Co.*, 454 P.2d 205 (Wash. 1969); *Boeing Airplane Co. v. Brown*, 291 F.2d 310 (9th Cir. 1961) (non-jury trial). In a strict liability action, however, there is no requirement that the receipt of evidence of design alternatives be predicated on defendant's denial that they were feasible. See e.g. *Mahoney v. Roper-Wright Mfg. Co.*, 490 F.2d 229 (7th Cir. 1973).

selective applications of the rule, some of its vitality remains nonetheless. See Federal Rules of Evidence, Rule 407; New Jersey Evidence Rule 51, and California Evidence Code §1151 reproduced in an Addendum hereto.

Recent cases, however, have drawn a sharp distinction between negligence, where the defendant's conduct is at issue, and strict liability, where the defectiveness of a product must be established. *Glass v. Ford Motor Co.*, 123 N.J. Super. 599, 304 A.2d 562 (1973); *Cronin v. J.L.E. Olson Corp.*, 8 Cal.2d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972); *Brody v. Overlook Hospital*, 121 N.J. Super. 299, 296 A.2d 668 (1972) rev'd 127 N.J. Super. 331, 317 A.2d 392 (1974) aff'd 66 N.J. 448, 332 A.2d 596 (1975).

The trend clearly indicates that courts are, with increasing frequency, permitting evidence of subsequent design modifications and alternative design possibilities to establish the "defect" element of the strict liability cause of action. See *Sutkowski v. Universal Marion Corp.*, 5 Ill. App.2d 313, 281 N.W.2d 749 (1972); *Ault v. International Harvester*, 117 Cal. Rptr. 812, 528 P.2d 1148 (1975); *Mahoney v. Roper Wright Mfg. Co. Inc.*, 490 F.2d 229 (7th Cir. 1973).

The product liability law of Illinois is strikingly similar to that of New Jersey. *Sutkowski v. Universal Marion*, *supra*, involved a defectively designed "steam

shovel". The decision was the first to hold that evidence of design modifications made after the accident were admissible to show that the original design was defective and thus, to establish strict liability.

In *Mahoney v. Roper-Wright*, *supra*, the Seventh Circuit Court of Appeals faced precisely the same problem. To show that the design of the defendant's farm machinery was defective, Mahoney offered to prove by way of expert testimony (as did plaintiff-appellant herein) that it was feasible for the defendant to have adopted safer design alternatives. Plaintiff also offered evidence of subsequent design modification (as did plaintiff-appellant herein). The Trial Court refused to receive evidence of either, the Court of Appeals reversed and remanded the cause for a new trial, and held: "Because the plaintiff here was prevented from introducing evidence of design alternatives and post-accident design changes, she was denied the opportunity to properly submit her case to the jury." 490 F.2d at 233.

The Trial Court in the case at bar, however, was not persuaded that the exclusionary rule has no application to the strict liability setting. If the issue arose in New Jersey at the time of the trial below, the court in that State would undoubtedly hold, as plaintiff-appellant urges this Court to do, that evidence of subsequent

remedial measures and design alternatives is admissible to show the defectiveness of a product's design. Of course, if the plaintiff's trial would have taken place in July instead of in May, Rule 407 of the Federal Rules of Evidence would have been applicable. The same result urged here then should be obtained under the new Federal Rule. Thus plaintiff-appellant also urges this Court to hold that under Federal Evidence Rule 407 evidence of subsequent remedial measures is admissible to show the defectiveness of a product where strict liability is at issue.

In *Stephan v. Martin Firearms*, 353 F.2d 819 (2d Cir. 1965) *cert. denied* 384 U.S. 959 (1966), this Court held that evidence of technological improvements made by a gun manufacturer was within the "subsequent repair" doctrine and thus not admissible to show negligence. The *Stephan* case is more significant, however, because it stands for the proposition that a Federal diversity court should apply the evidence rules of the state the substantive law of which is to be applied. In *Stephan* the tort law and evidence rules of Connecticut were applied. Under the *Erie v. Tompkins* doctrine, the question of admissibility of evidence was generally held to be one of state law. *J. H. Horne & Sons v. Bath Fibre Co.*, 272 F.2d 8 (1st Cir. 1959); *Conn v. Young*, 267 F.2d 725 (2d Cir. 1959). Prior

to July 1, 1975, Rule 43(a) of the Federal Rules of Civil Procedure provided that in cases where a federal and state rule of evidence existed, the rule most favorable to admission of the evidence should be followed. In discussing the new Federal Evidence Rule 407, Judge Weinstein had stated that:

"Since an extrinsic policy is involved in Rule 407, state rules *admitting* evidence of subsequent remedial measures should be followed in cases resting on state substantive grounds." Weinstein's Evidence ¶ 407 (02) at 407-12 (1975).

Rule 51 of the New Jersey Rules of Evidence provides:

"When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event."

The rule, by its own terms, limits its applicability to situations in which evidence of subsequent remedial measures is adduced to establish *negligence or culpable conduct*. A plaintiff may make out a viable cause of action sounding in strict liability without proof of either "negligence" or "culpable conduct". Thus, New Jersey Evidence Rule 51 simply does not come into play in conjunction with proof of facts establishing strict liability.

This Rule has thrice been cited by New Jersey appellate courts:

The earliest decision is *Price v. Buckingham Mfg. Co.*, 110 N.J. Super. 462, 266 A.2d 140 (1970). Its venerable position, however, is deceptively more apparent than real. The case involved a personal injury caused by an allegedly defective seat belt. At the trial court level a jury returned a verdict for defendant. The Appellate Division affirmed. The court psittacasistically held that Rule 51 precludes admission of evidence pertaining to subsequent remedial measures in order to prove negligence. In an opinion completely barren of any analysis, and without citing any precedent, the court gratuitously extended the exclusionary rule to strict liability actions on the theory that strict liability and negligence are one and the same. This holding is completely at odds with current substantive law.

The *Price* decision has implicitly been rejected by New Jersey's Appellate Division. Although it is the earliest decision to cite Rule 51, it has never been cited by any other court for the "subsequent repair" rule or for the similarity between negligence and strict liability. In addition, the two later Appellate Division cases involving Rule 51 completely ignored the *Price* decision. See *Ryan v. Port of New York Authority*, 116 N.J. Super.

211, 281 A.2d 539 (1971) and *Sobloff v. Yamaha Motor Co.*, 113 N.J. Super. 279, 273 A.2d 606 (1971).

Ryan v. Port of New York Authority, *supra*, did not involve a product-related injury. While the New Jersey court held that evidence of subsequent remedial measures was inadmissible to show negligence, it was admissible for other purposes. To insure that the evidence admitted was properly used, "the trial court was careful in its charge to the jury to instruct them correctly as to the use of evidence of [subsequent remedial measures]." 281 A.2d at 543.

In *Sobloff v. Yamaha Motor Co.*, *supra*, the plaintiff was injured when an allegedly defective motorcycle malfunctioned. The trial court directed a verdict for the defendant. As one of the grounds for appeal plaintiff urged that the trial court erred in excluding a manual published by the defendant which apparently showed a subsequent remedial measure relevant to the defect which caused the plaintiff's injuries. The appellate court reversed the Trial Judge, granted a new trial, but did not pass on whether this manual would have been admissible under New Jersey Evidence Rule 51. The court did "not wish to preclude the trial judge from ruling on the issue of admissibility on the basis of the proofs offered at the new trial." 273 A.2d 612.

Although a strict liability cause of action was stated, the Appellate Division in *Sobloff* ignored the *Price* decision. It would not even mention it as a guide to the Judge who would try the case anew and who had to pass on the manual's admissibility.

The refusal of the courts in *Ryan* and *Sobloff* to even cite *Price v. Buckingham* is fairly persuasive that it is of dubious precedential value. The Supreme Court of New Jersey would undoubtedly overrule the *Price* anathema when the opportunity presents itself; the same effect is accomplished in the interim by the Appellate Division's ignoring that decision.

"Although there must be faithful adherence to state substantive law in non-federal matters, it should be a wise and discerning loyalty. Blind adherence to a state decision, particularly ... of an intermediate appellate court, and to a lesser extent of the highest court without evaluating the decision in the light of other relevant data as to what the law is, will result in injustice and a perversion of the state law which the federal court sets out to apply." 1A Part 2 Moore's Federal Practice ¶0.309[1] p. 3323; *West v. American Tel. & Tel. Co.*, 311 U.S. 223, 61 S.Ct. 179, 85 L.Ed. 139 (1940). There being no state decision which is clearly controlling, a federal court

should apply the rule it believes the highest court of the state would apply if the specific question were put to it. *Quinones v. United States*, 492 F.2d 1269 (3d Cir. 1974); *Patch v. Stanley Works*, 448 F.2d 483 (2d Cir. 1974); *Gordon v. Motel City "B" Assoc.*, 403 F. 290 (2d Cir.).

The plaintiff-appellant urges that the New Jersey Supreme Court would hold that Evidence Rule 51, which excludes evidence of subsequent remedial measures to show the defendant's negligence, does not bar the receipt of such evidence to show a product's defective design where a cause of action in strict liability is stated. The progressive trends in New Jersey's substantive product liability law support this position.

Both New Jersey and California have the most advanced product liability law in the nation. One is virtually the mirror image of the other. Each cites the other's case law as supportive of its own holdings. There is evidence to suggest that New Jersey is even more pioneering than California because the former has extended the strict tort liability cause of action to cases of commercial economic loss in addition to personal injury. *Santor v. A.M. Karagheusian*, 44 N.J. 52, 207 A.2d 305 (1965). New Jersey holds lessors of automobiles strictly liable for defective bailments. *Cintrone v. Hertz Truck Leasing &*

Rental Service, 45 N.J. 434, 212 A.2d 769 (1965). In addition, the path for the development of strict tort liability in all states was first cleared by *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960), after which the California Supreme Court adopted the warranty-strict liability doctrine in *Greenman v. Yuba Power Products*, 27 Cal. Rptr. 691, 59 Cal.2d 57, 377 P.2d 897 (1962). Both jurisdictions have extended strict tort liability to real estate vendors. Compare *Schipper v. Levitt & Sons, Inc.*, 44 N.J. 70, 207 A.2d 314 (1965) with *Connor v. Great Western Springs Savings and Loan Ass'n*, 69 Cal.2d 850, 447 P.2d 609, 73 Cal. Rptr. 369 (1968).

In 1972, California was first to articulate that it had purged strict tort liability of the "unreasonably dangerous" requirement in order to clearly distinguish it from negligence. *Cronin v. J.B.E. Olson Corp.*, 8 Cal.2d 121, 104 Cal. Rptr. 433, 501 P.2d 1153 (1972).

In 1973, New Jersey followed California's lead and, relying heavily on *Cronin*, held that "the additional element of 'unreasonable danger' is not a valid part of the concept of strict liability in tort in the State of New Jersey." *Glass v. Ford Motor Company*, 123 N.J. Super. 599, 304 A.2d 562 (L. Div. 1973). The Court cited with

approval the definitive language of *Brody v. Overlook Hospital*:⁵

"... the concept of negligence is not relevant to the doctrine of strict liability. One is the antithesis of the other. Wherever the ordinary concept of negligence obtains, a showing of 'due care' by the defendant rebuts the plaintiff's contentions. But where strict liability prevails, 'due care' is not relevant."

Then, the Supreme Court of California, in *Ault v. International Harvester Co.*, 110 Cal. Rptr. 369, 515 P.2d 313 (1973), as modified on denial of rehearing 117 Cal. Rptr. 812, 528 P.2d 1148 (1975) held that since negligence

5. 121 N.J. Super. 299, 296 A.2d 668 (1972) rev'd 127 N.J. Super. 331, 317 A.2d 392 (1974) aff'd 66 N.J. 448, 332 A.2d 596 (1975). The Appellate Division reversed the lower court's holding that strict liability sans "unreasonable danger" was not applicable to blood banks and hospitals because blood was one of those "unavoidably unsafe" products covered by Restatement 2d of Torts Sec. 402A, Comment (k). The Supreme Court affirmed and followed the Glass decision refusing to impose the "unreasonably dangerous" burden on products other than blood. The net effect is to bring New Jersey law into line with that of other jurisdictions which take the view that the current state of human knowledge is incapable of screening out contaminated blood. This approves the conceptual divorce between negligence and strict liability, a marriage which, according to Glass, was never really consummated in New Jersey in the first place. 304 A.2d 565. Only one other New Jersey court has suggested a second area where the "unreasonably dangerous" element of strict liability ought to be preserved. Turner v. International Harvester, 113 N.J. Super. 277, 336 A.2d 62 (1975) held that the policy considerations in Glass were not present in the case of the sale of a second hand automobile.

plays no part whatsoever in strict liability, then §1151 of the California Evidence Code which, like New Jersey Rule 51, excludes evidence of subsequent remedial measures to show negligence, does not bar evidence of subsequent improvements to show defective design in a strict liability setting. The California Court reasoned that:

"While the provisions of section 1151 may fulfill [an] anti-deterrent function in the typical negligence action, the provision plays no comparable role in the products liability field. Historically, the common law rule codified in section 1151 was developed with reference to the usual negligence action, in which a pedestrian fell into a hole in a sidewalk (see, e.g., *City of Miami Beach v. Wolfe* (Fla.1955) 83 So.2d 774) or a plaintiff was injured on unstable stairs (see, e.g., *Hedges v. New York Rapid Transit Corporation* (1940), 259 A.D. 154, 18 N.Y.S.2d 304); in such circumstances, it may be realistic to assume that a landowner or potential defendant might be deterred from making repairs if such repairs could be used against him in determining liability for the initial accident.

When the context is transformed from a typical negligence setting to the modern products liability field, however, the 'public policy' assumptions justifying this evidentiary rule are no longer valid. The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will forego making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of

adoption of such improvement may be admitted in an action founded on strict liability for recovery on an injury that preceded the improvement. In the products liability area, the exclusionary rule of section 1151 does not affect the primary conduct of the mass producer of goods, but serves merely as a shield against potential liability. In short, the purpose of section 1151 is not applicable to a strict liability case and hence its exclusionary rule should not be gratuitously extended to that field."

By parity of reasoning one can persuasively argue that because the product liability law of both California and New Jersey are veritable mirror-images and further, because the subsequent remedial measures rules of each of these jurisdictions are the same, then the New Jersey Supreme Court would follow the *Ault* decision and reject the shallow analysis and holding of *Price v. Buckingham*, *supra*.

The public policy which underlies the strict liability cause of action has been reaffirmed innumerable times in New Jersey and California's case law. "[W]hen a manufacturer presents his products for sale to the public he accompanies them with an implied representation that they are reasonably fit for their intended use, and he is subject to an enterprise liability, the purpose of which is to insure that the cost of injury or damage resulting from defective products is borne by the makers of the products

who put them in the channel of trade, rather than by the injured or damaged persons who ordinarily are powerless to protect themselves. *Santor v. A & M Karaghensian*, supra, 43 N.J. 52 at p. 65, 207 A.2d 305 at 312." *Schipper v. Levitt*, 44 N.J. 70, 207 A.2d 314; *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960); *Jakubowski v. Minn. Mining & Mfg.*, 42 N.J. 177, 1922 A.2d 826 (1964).

That strict liability may attach to a defendant without any showing of negligence, indeed, regardless of fault, has been a fundamental characteristic of this body of law from its inception. Restatement of Torts 2d §402A. Plaintiff-appellant urges this Court to adopt a reading of New Jersey Evidence Rule 51 that would permit evidence of subsequent design modifications on the issue of defect. This is the *sine qua non* for the vindication of New Jersey's enterprise liability philosophy by persons such as the plaintiff-appellant. The effect of holding otherwise would be to discourage manufacturers from upgrading their defectively designed products, "Products Liability and Evidence of Subsequent Repairs" 1972 Duke L.J. 837, 848 (1972), and that would surely blunt the progress that has been made in the area of product safety. See generally 2 Hofstra L. Rev. 445-856 (1974).

C. THE TRIAL COURT ABUSED ITS
DISCRETION IN EXCLUDING PHOTO-
GRAPHS OF PLAINTIFF'S BURN
INJURIES WHICH WERE RELEVANT ON
LIABILITY ISSUES

Plaintiff-appellant offered 4 colored photographs (Plaintiff's Exhibits 46, 47, 48 & 49 for identification (556A-559A) of himself taken within a day of the fire (134A-138A, 156A, 163A-164A, 170A-175A, 354A-357A, 497A). In weighing the probative value of these photos against their prejudicial effect, plaintiff-appellant concedes that the trial court's exclusion of the photographs on the question of damages was warranted. As the case on liability proceeded however, it became increasingly evident that the scales had tipped toward the photographs' admissibility. The photographs depicted a pattern of injury which was supportive of plaintiff's theory that the fuel tank and the filler neck assembly were the source of gasoline vapor leakage in the cab.

Aside from the testimony of lay eye witnesses, the only evidence relative to design negligence and defect was the opinion testimony of plaintiff's expert witness. The trial court excluded the Cole patent, forbade the reading of defendant's formal admissions that it had discontinued the design and manufacture of vehicles with

gasoline tanks within the passenger compartment, and the manufacture of filler tube assemblies with the arrangements employed in the V4000 series. The court would not allow the plaintiff to elicit testimony from his expert witness pertaining to subsequent design changes, and safer design options. The exclusion of all this evidence by the trial court left the colored photos as the only evidence corroborative of the plaintiff's theory.

The photographs show burns to the plaintiff's face, eyelids and both hands and arms, injuries suggestive of a flash fire in the space in front of plaintiff's face. The burn pattern of the truck's other occupants is consistent in this regard (460A-462A). Burning was generally more extensive on the left side. One photograph shows burns along the left portion of plaintiff's back running from shoulder to hip as well as about the circumference of the neck. These left-back injuries would tend to suggest that there was burning behind and to the left of the plaintiff, the direction in which the filler neck was located. The igniting spark could possibly have come from the truck's ignition switch which was to the left of where plaintiff was sitting. From these burn patterns, a jury could

have inferred that the designs of the fuel tank and/or filler tube were at least partially involved in the leakage of gasoline vapors into the cab.

In addition, the sites of injury as shown by the photographs would tend to contradict defendant's explanation of the fire (467A-472A). The defendant's expert testified that a sustaining fire from the engine emerged through the cab floor in the vicinity of where Mr. Hughes was sitting (448A-463A). The area of the plaintiff's legs below his knees, which, under defendant's view were the parts of his anatomy closest to the fire, however, sustained minor burns (458A-462A). The defendant's expert also testified that if there were a flash fire due to gasoline vapors within the cab, as plaintiff contended, then combustion would have occurred so rapidly that the plaintiff would have sustained eye injuries (332A-335A). The photographs show burn injuries about the area of the plaintiff's eyes. In fact his left eyelid was more severely burned than the right; the entire left part of his face was generally more severely burned than the right side (464A- 472A).

From this pattern of injury a jury could well infer that there was a flammable concentration of gasoline vapors within the cab which emanated from and

was ignited to the left of plaintiff's body. Had the photographs been admitted, particularly in light of all the other evidence on the liability issues that the trial court had excluded, a jury may well have been able to draw these inferences and return a verdict for plaintiff (354A-357A).

POINT III

THE TRIAL COURT IMPROPERLY EXCLUDED
PLAINTIFF'S EXPERT TESTIMONY IN REBUTTAL

At the trial, the plaintiff-appellant's explanation of the fire was that the location of the fuel tank within the cab, the design arrangement of the filler neck and the proximity of the filler hole to the driver's window encouraged the accumulation of a combustible level of gasoline vapors within the cab.⁶ The plaintiff's expert testified that the probabilities suggested the source of ignition as being also within the cab. A

6. Early in the discovery phase plaintiff considered the possibility of the unsafe design of certain parts of the engine and the fire wall as a factor in the flash fire. (See plaintiff's Answer to defendant's Interrogatory #34 which the court over objection allowed the defendant to read to the jury (295A-298A)). By the time of trial, however, plaintiff's theory had developed so as to concentrate on the design features within the cab. For all intents and purposes, plaintiff abandoned his claim of design shortcomings in the engine.

pivotal fact in plaintiff's proof was that there existed a firewall between the engine and the cab the function of which was to limit fire spread moving from the engine rearward (184A-186A, 195A, 210A, 213A). There was still a possibility however, in the opinion of plaintiff's expert, that a flaming particle may have entered the cab through narrow holes in the fire-wall (195A, 240A-241A, 311A). "But that would not have produced this flame emerging from under the dash across the entire width of the cab" (242A). While plaintiff's explanation did not deny the possibility of two simultaneous fires - one in the cab and one in the engine, assuming there was a fire in the engine first, and a burning particle was propelled through a small hole in the fire-wall, without a combustible level of gasoline vapors within the cab independently, a spontaneous flame fire would not have occurred in the cab (310A-311A).

General Motors offered an explanation of the fire that placed the predominant source of gasoline vapor and the igniting spark within the engine compartment. The defendant's expert assumed that nine gallons of gasoline had leaked within the engine compartment thus producing a concentration of vapors which were ignited by a spark near the distributor. The resulting con-

flagration in the engine compartment propelled flames up through two slots in the floor of the cab into which the levers controlling the dump mechanism were inserted (328A, 335A, 337A-339A, 350A, 433A, 440A, 448A-460A). These controls were installed by an independent contractor after the cab and chassis were delivered to the defendant's dealership. The suggested inference to be drawn from the defendant's explanation of the fire was that even if there were a fire in the engine compartment of such great magnitude, had it not been for the post-delivery modification of cutting slots through the floor of the cab to accommodate the fork levers, the fire would have been contained under the hood and would not have penetrated into the cab.

On rebuttal, the plaintiff sought to negate defendant's theory of the emergence of the fire through slots in the cab's floor (480A-488A), which was first introduced as part of defendant's case. The trial court however was of the impression that Professor Weinstein had already testified on that point as part of plaintiff's case-in-chief (484A-487A). The trial court's misunderstanding of Professor Weinstein's earlier testimony may be related to its erroneous view that New Jersey law required the plaintiff to negate all other causes of the accident in order to circumstantially

establish a product's defective condition (205A). Eliminating other causes of the accident was not part of the plaintiff's burden in this litigation when defective design had been already directly established by expert testimony. *Jakubowski v. Minnesota Mining & Mfg. Co.*, *supra*; *Scanlon v. General Motors Corp.* *supra*.

In *Weiss v. Chrysler Motors Corp.*, 515 F.2d 449 (2d Cir, 1975) at 457-458 this Court stated:

"While a trial judge has discretion to exclude rebuttal evidence which would have been admissible if offered as evidence in chief, [citations omitted], such discretion should be tempered greatly where the probative value of proffered evidence is potentially high and where such evidence, though admissible on the case in chief, was unnecessary for plaintiff to establish in its prima facia case [citations omitted]."

As in the *Weiss* case, plaintiff-appellant urges here that the rebuttal testimony of his expert witness should have been admitted in the exercise of sound judicial discretion.

Since negating other causes of the fire, including defendant's version, was not properly a part of plaintiff's prima facia case, the plaintiff was deprived of his right to have his expert express his view on that matter. On this very point the *Weiss* decision quoted Wigmore:

[F]or matters properly *not evidential until the rebuttal*, the proponent has a *right* to put them in at that time, and they are not subject to the discretionary exclusion of the trial court ... matters of true rebuttal could not have been put in before, and to exclude them now would be to deny them their sole opportunity for admission". Wigmore, Evidence §1873 at p.517 (3d ed.1940) (emphasis in original)." 515 F2d. at 458-459.

Plaintiff-appellant was improperly denied his right to rebut the defendant's version of the fire; accordingly, the *Weiss* decision would mandate that the jury's verdict be set aside.

POINT IV

THE TRIAL COURT'S INSTRUCTIONS TO THE JURY
PERTAINING TO THE CUSTOM OF THE INDUSTRY WAS
UNWARRANTED BY THE EVIDENCE AND WAS ERRONEOUS

The vehicle involved in this litigation was a 1966 GMC truck of the light to middle weight class. In that year, the "big three" truck manufacturers -- Ford, Chrysler and General Motors -- equipped their trucks of this weight class with fuel tanks within the cab (325A). One manufacturer, International Harvester, departed from the industry norm and produced a light medium duty truck with the fuel tank outside and below the cab. International Harvester's filler tube, according to defendant's expert, passed down along the right interior

side of the cab and into the fuel tank (392A-394A). He could not recall the location of the filler tube's rubber coupling (393A-394A). According to defendant's expert witness, it was not until 1973 that Ford and General Motors repositioned the fuel tanks of their light-medium duty trucks to the outside of the cab and Chrysler Dodge followed suit in 1974. This testimony pertaining to design modifications came out outside the hearing of the jury (427A).

The defendant requested the Court to instruct the jury, in substance, that the custom of the industry in 1966 with reference to the location of gasoline tanks in trucks could be taken into consideration by them in reaching their determination as to whether the defendant's design was reasonably safe (489A-491A). The Court granted the request (492A)* and instructed the jury that:

"In determining whether this product is defective you should also consider the generally accepted concepts and practices with respect to the design and installation of gasoline tanks prevailing for trucks of this nature in 1966. Thus, you may consider whether other manufacturers were placing gasoline tanks in the trucks in the same manner as General Motors when they built them in 1966" (519A).

* Exceptions automatic as per determination of the Trial Court (492A)

Plaintiff-appellant urges two positions. First, he argues that the trial court's charge that other manufacturers were placing gasoline tanks in their trucks in the same manner as did defendant is unsupported by the evidence and was, therefore, erroneous. Plaintiff's fallback position is that even if the instruction were warranted by the evidence then it was insufficient as given and the court erred in refusing plaintiff's request that it be supplemented.

The evidence adduced at trial showed that the defendant's fuel tank was located immediately behind the passenger seat within the cab; the filler tube, which acted as the conduit for gasoline filling, was made of plastic and rubber with a screw type clamp around the joint between these materials; that there was also a joint between the filler tube and the spout of the fuel tank; that the filler tube exited through the exterior wall of the cab only a few inches behind the driver's window; that the filler tube was concealed between the exterior and interior wall of the cab; that the filler tube was not accessible to visual inspection for leakage formation and that if repair of the filler tube was needed it required dismantling the fuel tank (196A-201A, 405A-409A, Plaintiff's

Exhibits 14, 16, 17, 19, 42 and 45.)). The foregoing facts describe the manner in which the defendant placed the fuel tanks in its trucks in 1966.

Aside from oblique references to tank location (325A, 391A-394A), there is not a shred of evidence in the entire trial record that would indicate that there were other truck manufacturers that installed their fuel tanks in the same manner as did the defendant. The defendant adduced no evidence regarding the design and construction of the filler necks employed by other manufacturers. There was no evidence on the position of the filler hole in relation to the driver's window. The issue of how other manufacturers positioned their tanks and filler neck assemblies was never fully and fairly presented to the jury. It was, therefore, error to instruct the jury on the custom of the industry in the absence of evidence on that point. *Mounds Park Hospital v. Von Eye*, 245 F.2d 756 (8th Cir. 1957); *Smith v. Miller Creek Ct., Inc.*, 457 F.2d 589 (10th Cir. 1972).

If the evidence was sufficient to warrant an instruction as to the custom of the industry, then the court's refusal to grant plaintiff's request that similar industry wide design does not mean that that

design was not defective, was erroneous (534A, 535A).

Section 295A of the Restatement 2d of Torts provides:

"In determining whether conduct is negligent, the customs of the community, or of others under like circumstances, are factors to be taken into account, but are not controlling where a reasonable man would not follow them."

The principle embodied in this section has obvious applicability to the product liability setting, and has been cited by the New Jersey courts, *Mathis v. Fantozzi*, 105 N.J. Super 182, 251 A.2d 470; *Shafer v. H.B. Thomas Co.*, 53 N.J. Super. 19, 146 A.2d 483 (1958) and the Federal Courts in the area of product design *Northwest Airlines Inc. v. Glenn L. Martin Co.*, 224 F.2d 120 (6th Cir. 1955) cert. denied 350 U.S. 937 (1956).

Even though a manufacturer is able to show that it conformed to the custom of the industry, this does not establish that it conformed to the required standard of care. In the words of Mr. Justice Holmes, "what usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it is usually complied with or not." *Texas & Pac. Ry. v. Behymer*, 189 U.S. 468, 470 (1903); *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932).

"Manufacturers Negligence of Design or Directions for Use of a Product, 71 Yale L.J. 816, 849 (1962).

There was evidence that at least one of the defendant's competitors positioned the gas tanks outside the passenger cab. An essential element of plaintiff's theory had been all along that part of the negligence or defectiveness of the defendant's design was its placing the gas tank in the cab. "[W]henver the particular circumstances, the risk, or other elements in the case are such that a reasonable man would not conform to the custom, the actor may be found negligent [or the design defective] in conforming to it."

Restatement of Torts, 2d §295A Comment (c). Based on the fact before the jury that the fuel tanks of International Harvester trucks were located in a position which departed from the norm, the jury was entitled to be instructed that mere conformity to the prevailing industry custom was not sufficient to establish lack of defective design.

CONCLUSION

THE JUDGMENT DISMISSING THE COMPLAINT SHOULD BE
VACATED; THE CONTINUED DEPOSITION OF THE DEFENDANT BY
EDWARD COLE SHOULD BE ORDERED AND THE CASE REMANDED
TO THE U.S.DISTRICT COURT FOR A NEW TRIAL.

Respectfully submitted,

ARNOLD B. ELKIND
Attorney for Plaintiff-Appellant

Of Counsel

ARNOLD B. ELKIND
BENNETT J. WASSERMAN

ADDENDUM

STATUTES INVOLVED

New Jersey Rules of Evidence

Rule 51. SUBSEQUENT REMEDIAL CONDUCT

When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with event.

California Evidence Code

§1151 SUBSEQUENT REMEDIAL CONDUCT

When, after the occurrence of an event, remedial or precautionary measures are taken, which, if taken previously, would have tended to make the event less likely to occur, evidence of such subsequent measures is inadmissible to prove negligence or culpable conduct in connection with the event.

Federal Rules of Evidence

Rule 407. SUBSEQUENT REMEDIAL MEASURES

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

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